IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 181

AARON ROTH,

Petitioner,

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION, RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, THOMAS DAY, and VERNON HOUSEWRIGHT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA (EMBODYING BRIEF).

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STATEMENT OF MATTER INVOLVED.

This is not primarily a labor case, as its title might indicate. Rather, petitioner asserts that the Indiana Supreme Court has *discriminated* against him by stating *non-existent facts* against him in its opinion, so as to

deprive him and his property of the equal protection given by Indiana law to other citizens similarly situated. The grievance he presents is so fundamental as to merit serious inquiry by this Court.

Petitioner, a small grocer, had three clerks who were originally forced to join the respondent Local Union by the Union's coercion and threats against them. They escaped from the Union at the first opportunity by orally repudiating it, which they subsequently confirmed by sending a written resignation to the Union. The Union picketed petitioner for the sole and avowed purpose of compelling him to sign a contract agreeing to compel his employees to rejoin the Union they hated, against their will, or be discharged from their jobs. There was no finding or evidence that the Union sought to picket for the purpose of advertising or conveying information. On the contrary, its own international representative (respondent Housewright) admitted in his testimony that the sole object of picketing was to compel petitioner to sign said agreement to coerce his employees. He refused to sign. He informed the employees that they could do as they pleased about joining and that it made no difference to him. The picketing, though non-violent, falsely stated to the public that he was "Unfair" to the Union, and so damaged his business that it would be completely destroyed in a short time without injunctive relief.

Petitioner sued in the state trial court for temporary and permanent injunction under the Indiana labor injunction statute (which is a replica of the Norris-LaGuardia Act, but which the Indiana Supreme Court has construed more favorably to employers than the Norris-LaGuardia Act has been construed in the Federal Courts). The trial court refused to grant an effective temporary injunction,

so petitioner appealed to Indiana Supreme Court, resulting in the following decision:

Roth v. *Local Union, etc.* (Dec. 22, 1939), 216 Ind. 363, 24 N. E. (2d) 280 (R. 18), which reversed the trial court, mandated entry of a temporary injunction prohibiting the picketing, and construed the Indiana statute to mean as follows:

> "The statute here under consideration declares that it is the public policy of this state that the *individual unorganized worker shall be free to decline to associate* with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean that *no labor union may demand that an employer require his employee to join such union,* because no employer has the right to require an employee to join or refrain from joining a union. *Any person or group* which undertakes to coerce an employer to do that which is contrary to the express public policy of this state thereby undertakes to compel the performance of an *unlawful act.* The lawful weapon of peaceful picketing may not be utilized to accomplish *such an unlawful purpose.* It is quite immaterial that the things done to bring about the unlawful purpose were not *per se* unlawful. *This is our interpretation of our statute.*"
>
> *Roth* v. *Local Union, etc.*, 216 Ind. 363, 370 (top), 24 N. E. (2d) 280, 283 (top 1st column).

Thereafter, trial was had on the permanent injunction issue and permanent injunction was granted, from which the Union appealed to the Indiana Supreme Court, resulting in the following decision:

Local etc. Union v. *Roth* (Feb. 24, 1941), 218 Ind. 275, 31 N. E. (2d) 986 (R. 41), which reversed the trial court and ordered a new trial of the permanent injunction, on the ground that certain evidence tended to indicate that the employer may have coerced his employees to send said

written resignation to the Union, merely because he had handed one of them a written form suitable for that purpose, which the employees already desired. A reading of that opinion discloses that it strains at a gnat and swallows a camel,—strives to accuse the employer, on the flimsiest pretext, of coercing his employees, while placing the court's blessing on the actual and gross coercion practiced on them by the Union. But the effect of that decision was merely to order a new trial, so no petition for certiorari could be prosecuted from it.

Thereafter, a new trial was had in the trial court, with the employees themselves testifying, and the trial court inquired with painstaking care into the question of whether petitioner had coerced his employees as imagined in the previous opinion, after which the trial court made written findings of fact showing that this accusation was groundless and preposterous.

See: Finding No. 4 (R. 49).

Said finding was based upon:

(1) *Uncontradicted testimony* of the employees: (R. 58-91).

(2) *Total absence* of evidence to show any guilt of petitioner;

(3) *Admission* of the Union's international representative (respondent Housewright) in his testimony that the sole cause of the picketing was to coerce petitioner to sign the unlawful contract, rather than any grievance against petitioner for allegedly causing resignations. (R. 113, top.)

Not only did the above finding and admission of respondents exonerate petitioner of this fictitious charge

in the previous opinion, but the answer of respondents had made no such charge against him. (R. 7, 8, top.) In the absence of such answer, under Indiana law, a judgment cannot be rendered by the trial court or Supreme Court on a non-existent issue, whether law or equity. (*Boardman* v. *Griffin*, 52 Ind. 101, 106; Secs. 2-101, 2-1015, 2-1024, Burns' Ind. Statutes 1933.)

On the basis of the above findings, evidence and issues, showing petitioner to be innocent, the trial court, at the close of the new trial stated conclusions of law reciting that, under the true facts, petitioner was entitled to a permanent injunction under the rule of law laid down in the Indiana Supreme Court's opinion in the first appeal on the temporary injunction (*Roth* v. *Local Union*, 216 Ind. 363, 370, *supra*), which rule of law construing the Indiana statute has never been reversed or modified. (See R. 51 for conclusions.) After which the trial court entered a permanent injunction. (R. 53.) Respondents appealed again to the Indiana Supreme Court, resulting in the following decision:

Local etc. Union v. *Roth* (March 5, 1942, not yet printed in official reports), 39 N. E. (2d) 775 (R. 117), which again reverses the trial court with instructions to enter final decree against petitioner. This opinion simply repeats the Supreme Court's accusation, even flimsier than in the previous opinion, that petitioner coerced his employees. The opinion turns both petitioner and his employees over to the vengeance of the Union, under the pretext of protecting the employees from the imaginary coercion of petitioner. The opinion recites that the present evidence is substantially the same as on the last preceding appeal, which if true merely shows that the Supreme Court deprived petitioner of his constitutional

rights when it wrote the preceding opinion. However, the effect of the previous opinion was exhausted when a new trial was had. Petitioner has brought up all the evidence on the new trial, and the question is not whether the preceding opinion was wrong, but whether the present judgment of the Indiana Supreme Court can stand on the present record.

Petitioner is aware that this Court will not weigh or consider *conflicting* evidence, but he relies on the well recognized and *necessary* exception: that where the highest court of a state bases its judgment on a non-existent fact, contrary to all the evidence and record, this Court will review the latter question to prevent a citizen from being denied equal protection of the state law, and to prevent him from being deprived of liberty or property without due process of state law; otherwise these rights could always be circumvented by the device of stating non-existent facts against the citizen.

When the Indiana Supreme Court rendered the last cited opinion and judgment, petitioner presented these constitutional errors to that court by petition for rehearing, as was his absolute right under its Rule 2-22, which petition was entertained by the court and denied on March 26, 1942. (R. 119-122.)

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is based upon *Judicial Code, Sec. 237, amended* (being Title 28, Sec. 344, F. C. A.; being also R. S. Secs. 690, 709), which enables this Court to review the highest court of a state in cases

> "where any title, *right, privilege,* or *immunity* is specially set up or claimed by either party under the Constitution;"

which petitioner did in the Indiana Supreme Court (R. 119-122), said court being the highest court in Indiana in which a decision could be had (Art. 7, Secs. 1-4, Ind. Constitution).

Petitioner contends that the Indiana Supreme Court's decision and judgment complained of, deprive him of the equal protection of the law of Indiana and deprive him of liberty and property without due process of law of Indiana, contrary to the 14th Amendment of the Constitution of the United States (said Indiana law being Secs. 40-501 to 40-514, Burns' Indiana Statutes, 1933; otherwise known as Acts 1933 Indiana, General Assembly, Ch. 12).

Said deprivation consists of the fact that the Indiana Supreme Court based its said decision and judgment upon its own finding of *fictitious and non-existent facts*, which are not supported by any evidence and are contrary to the undisputed evidence and record, whereby its opinion falsely brands petitioner as a law-breaker. On the basis of this false accusation and premise, the decision denies him the rights given by said law to other Indiana citizens similarly situated; thereby enabling this Court to examine the true facts under the following rule:

"And this Court *will* review the finding of facts

by a State Court where a Federal right has been denied as the result of *a finding shown by the record to be without evidence to support it;* or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pac. R.* v. *North Dakota,* 236 U. S. 585, 593, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; 45 S. Ct. 129, 69 L. Ed. 342, and cases cited."

Fisk v. *State of Kansas,* 274 U. S. 380, 385 (bottom), 71 L. Ed. 1104, 47 S. Ct. 655, 656 (bottom 2nd column).

THE QUESTIONS PRESENTED.

A comparison of the false accusations of fact made against petitioner in the opinion (*Local etc. Union* v. *Roth,* not officially reported, 39 N. E. (2d) 775) with the undisputed facts of record, plainly shows that the opinion and judgment of the Indiana Supreme Court violates petitioner's constitutional rights as follows:

(1) Denies petitioner equal protection of the Indiana law, by means of falsely painting him as a law-breaker so as to exclude him from the protected class, contrary to:

14th Amendment, U. S. Constitution.

(2) Deprives petitioner of property without due process of law, by adjudging that his property be exposed to admitted certain destruction at the hands of respondents, and predicating this judgment (of the Indiana Supreme Court) upon the false and non-existent fact that petitioner is a law-breaker. Basing

a judgment on false facts is denial of due process, contrary to:

14th Amendment, U. S. Constitution.

(3) Compels the now-innocent petitioner to become a law-breaker in the future in order to prevent destruction of his property. He must either: (a) obtain private relief by forcing his employees to re-join the Union against their violent objection, which will cause the Union to stop picketing but which will be a violation of the statute as construed in the first opinion, 216 Ind. 263; or (b) not force his employees to re-join, which will cause the Union to picket him to destruction, but which will be complying with the law. Any state court decision which compels an innocent man to turn law-violator in order to prevent property destruction, constitutes denying equal protection, depriving of property without due process, and depriving of liberty without due process, contrary to:

14th Amendment, U. S. Constitution.

What has just been said in paragraph (3) would be true even if petitioner had violated some law in the past. A state court cannot send a past violator out with an implied command or invitation to break the law a different way in order to save his property. This is contrary to the *14th Amendment.*

(4) Exposes petitioner's property to destruction without limit of value and without regard to the trivialty of his alleged law violation. This amounts to denial of equal protection, and deprives of property without due process, contrary to:

14th Amendment, U. S. Constitution.

(5) Permits respondents to destroy petitioner's property as a means of accomplishing their unlawful object against his employees (to force them to re-join the Union, which the first opinion in 216 Ind. 263 says is an unlawful thing for the Union to do). This deprives petitioner of property without due process, contrary to:

14th Amendment, U. S. Constitution.

(6) Permits respondents to force petitioner to participate in their unlawful scheme of coercing the employees, under penalty of having his property destroyed. This is contrary to:

14th Amendment, U. S. Constitution.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

False Accusation Against Petitioner in Opinion as Excuse for Denying Him Relief:

The last opinion, *Local etc. Union* v. *Roth*, 39 N. E. (2d) 775, adopts the following statement as the Indiana Supreme Court's summary of the facts in this case, and makes that statement the cornerstone of its decision:

> "The employer had *interfered* and aided and *encouraged* his employees to sever their connection with the union." (Our italics.)
>
> 29 N. E. (2d) 775, 776, par. 1.

And the opinion also adopts by reference the accusations made in the preceding opinion, which said:

> "But the fact is that *he has not been law abiding* with respect to the *statute*. He has interfered and intermeddled; he has encouraged, if not *coerced*, his employees, which conduct is a *violation of the statute* upon which he relies for protection against picketing. * * *" (Our italics.)
>
> *Local etc. Union* v. *Roth*, 218 Ind. 275, 281 (bottom), 31 N. E. (2d) 986, 989.

All the evidence in the record on the above subject was furnished by the employees themselves, whose testimony we condense in narrative form as follows so far as pertains to this subject. (Respondents can hardly complain about the accuracy of this summary because we have copied it almost verbatim out of their own brief in the Indiana Supreme Court):

Dorothy Carlson (R. 84-91):

> "I am the Dorothy Carlson who testified in the previous trial of this case. On the morning that this picketing started, one of the union agents came to me

and talked to me in the store and told me if I didn't get out and picket it would mean that there would be a $50.00 fine to *get back into the union.* He requested me to go out on strike and to picket. *I told him I absolutely would not.* I was under *no fear* of what my *employer* might do or want me to do. This statement was of my own free will and accord. (R. 84-85.)

"I kept right on working while the picketing was going on, for I understood from the time that the statement was made that it would cost me a $50.00 fine *to get back into* the union, *that I was out of it,* and that understanding occurred *before* the picketing ever started. (R. 85, middle.)

"*I didn't want to join the union in the first place.* I only joined it because I didn't want to make any trouble for my employer and they had said that they would picket, which would hurt business, so I joined. *Before I signed up one of the union agents told me that eventually it would mean I would probably lose my job anyhow,* so I might just as well join up. That is the *only reason I joined.* (R. 85, bottom—86, top.)

"*I never wanted to belong to the union any of the time I was in it. I only stayed in because I was afraid the store would be picketed.* (R. 86, botton—87, top.)

"Plaintiff's Exhibit No. 2 (written form of resignation from Union) was handed me and I took it over to the counter and set it down and *the other two clerks and I talked about it and we were more than welcome to sign the paper to get out of the union.* We didn't care for it in the beginning or all the way through. *That is what we said to each other and that is the only reason we signed it.* When I signed it I regarded it as a formal notification of the fact that I was *already out* of the union. I received Exhibit No. 2 from the hand of Mr. Roth in the first place. (R. 87, top.)

"During the time that we were discussing it, *Mr. Roth had gone back* over to the meat side and *tended to his business* and I went over on the grocery side and set it down there and discussed it. Mr. Roth

was waiting on trade and *paying no attention to us.* (R. 87, middle.)

"The fact that this paper came from the hand of Mr. Roth did not have any influence on my mind one way or another. The space where Mr. Roth was standing was about forty feet distant across the store from where we were standing. There was no other person with us. We all affixed our signatures at that time. (R. 87, bottom—88, top.)

"I signed of my own free will and accord. I read it before I signed it, I *understood* its language and the language on the Exhibit *expressed my own intention and desire,* and *that is the reason* I signed it. There was *no fear or thought in my mind about Mr. Roth* discharging me if I stayed in the union. (R. 87, middle.)

"Prior to this time *Mr. Roth had told us to do as we wished,—that it was of our own free will whether we wanted to join. I remembered that statement and had it in mind at the time I signed this resignation. I understood that it was entirely up to me at all times. Mr. Roth never did anything whatever, at any time, that influenced me to get out of the union.* (R. 88, bottom—89, top.)

"I had been at peace with my employer, getting along satisfactory, and at the time of the picketing I was getting $17.00 a week, which was *higher than the union* wage scale. I was working around forty-eight hours a week, *which was less* than the union scale." (R. 89, middle.)

Note: Foregoing is from direct examination. No substantial change was made in cross and re-direct examination (R. 90-92), so latter are omitted to avoid prolixity.

Wellington Barnes (R. 58-84):

"I am now in the employ of Aaron Roth and was in his employ on the 17th day of May, 1939, when this picketing occurred. The store is owned by Mr. Roth and at the time that the picketing occurred Mr.

Roth had three employees consisting of myself, Meyer Kaplan and Dorothy Carlson. Prior to the 17th day of May, 1939, I joined the defendant union. Before I had joined, one of the business agents of the union came and talked to me at the store and asked us to join up with the union. I told him I want to know some of the *reasons* and what would be the benefits out of joining them and he didn't give me any satisfaction. He just told me it would be *best* to join; so I walked away from him and he followed me to the back and I walked away from him again and then he came up to me and said, '*Better join or the store will have pickets in front of it.*' *So* the next day we joined up. He also talked to the other two clerks, Meyer Kaplan and Dorothy Carlson, the same day he talked to me. At the time that I talked to the agent of the union, *I told him I didn't care to join* it and it was after I had made this statement that he stated I had better or there would be pickets out in front. (R. 58-59; R. 61, bottom—62, top.)

"On the morning that the picketing started I was in the store. I saw one of the defendants talking to Mr. Roth that morning. After he had talked to Mr. Roth I saw him go over and talk to Dorothy Carlson and also with Meyer Kaplan and then he came and talked with me. *He merely said, 'I don't suppose you will strike,' and I answered him, 'That is right.'* He then walked out of the store and then there were pickets out in front of the store. He took them out of his car from across the street. The picketing began about five or ten minutes *after* he had walked out of the store. The picketing sign read in substance: 'This store is unfair to Retail Clerks Union Local 1460.' (R. 62-63.)

"I, Meyer Kaplan and Dorothy Carlson *kept right on working* in the store and *none of us struck.* At that time *none of us had any quarrel or controversy with our employer.* The store had opened up about the previous January and I started working there very shortly after that time. Dorothy Carlson had worked there from the time it had opened as also did Meyer Kaplan. *There had never been any con-*

troversy to my knowledge between any of the clerks and Mr. Roth down to the time of the picketing and we continued to work in business with him during the time the picketing was going on. (R. 65, top.)

"My signature is attached to Plaintiff's Exhibit No. 2 (written resignation from Union) and the signature of Dorothy Carlson and Meyer Kaplan also appear thereof. This paper, Exhibit No. 2, was received by Miss Carlson from Mr. Roth and *he went back to the meat side,* over there, and she gave it to me to read over. *She* said, 'Here read this.' I read it and *was willing* to sign such a thing as that *to get out of the union, which I didn't want to belong to in the first place.* The store is about forty feet wide, the meat side is on the south side thereof and the grocery part on the north side. I saw Mr. Roth hand Dorothy Carlson this paper. *From Mr. Roth she then came over to the grocery counter on the north side of the store and Mr. Roth remained on the meat side over at the extreme south side of the store.* Meyer Kaplan was with me and we three clerks were standing around the grocery desk on the far side of the store at the same time, looking at this paper. Each of us read it separately and then we each signed it. I signed first and then Mr. Kaplan and then Miss Carlson. After it was signed, I imagined it was mailed. *Miss Carlson took care of it.* I handed it back to *her.* While we were reading this paper and signing it *Mr. Roth remained on the meat side of the store.* He *never* came over and said anything to any of us. All he ever said to us at any time about whether we should sign this paper or not was that *'It was up to us'.* This statement was made to us *before the day we signed* this paper. *Mr. Roth never at any time said anything to us as to whether or not we should sign* the paper marked Plaintiff's Exhibit No. 2, and *never spoke to us about this paper.* (R. 65, bottom—68, top.)

"*Mr. Roth never said anything to us one way or another about getting out of the union* and at the time that we signed the paper there was *no fear in my mind* about Roth discharging me if I stayed in the

union. I *didn't want to join* the union in the first place. My *only reason* for joining the union in the first place was to keep them from placing pickets in the front of the store. I don't care for the union. (R. 69, top—70, top.)

"I read Plaintiff's Exhibit No. 2 before I signed it. *I signed it of my own free will.* I understood its meaning and the language *expressed my true desires and intention.* That is the *only reason I signed it.* (R. 70, middle.)

"When I *refused to strike* and refused to quit work just before the picketing started, he (respondent, Day, union agent) told us that *in order to get back into the union* there would be a $50.00 fine and from this statement I understood that *I was already out of the union and expelled from that time on,* and I did not look upon myself as a member of the union any longer. I intended the written resignation to be a formal notification of that fact and it was my understanding that *Dorothy Carlson did send it to the union,* and so far as I know, it was sent to the union by registered mail. I considered my resignation an accomplished fact from the time of my talk with the agent that morning, before the picketing started. (R. 70, bottom—71.)

"*I never heard Mr. Roth say anything to the other clerks desiring them to get out of this union.* The fact that I saw Mr. Roth hand this paper, Plaintiff's Exhibit No. 2, to Dorothy Carlson before she brought it over to me, *did not have any influence on my mind one way or another as to whether I should sign it or not.* As we were reading it *we gave no weight to the fact of what Mr. Roth might want us to do.* In fact, Mr. Roth was not discussed between us while making up our minds on the subject. The other two clerks did not express any fear as to what might happen to them or their jobs if they stayed in the union. (R. 72, bottom—73, top.)

"*It had been my continuous desire to get out of the union from the time that I had joined.* After I joined the union, a woman union representative came around

to collect dues. I delayed making my payments because we didn't want to give them our money. My attitude was hostile to the union *before* picketing commenced. I would delay making payments each month when they came around to collect the dues. (R. 73, middle—74, top.)

"At the time the picketing started, my weekly wage was $30.00. The top union scale was $20.00 per week after three or four years of membership. I got that figure from the union agents themselves. The working conditions in the store were sanitary and satisfactory to us employees. I never had any trouble with my employer. I never attended a union meeting or asked the union to intercede for me on any matter. I had signed up with the union agent at the store solely because of his threat to picket. Dues were collected at the store. This was the only contact I ever had with the union. (R. 74, middle—75, top.)

"The wages, hours and working conditions in Mr. Roth's store at the time this picketing began *were superior to those of the general standard in that community.* (R. 75, middle.)

"After the picketing *I did not want to belong to the union again. I do not want to belong to it now and would not join it,* and do not want to have anything to do with the defendants. *This desire arises out of my own free will and no word or act of Mr. Roth, at any time, influenced that desire in my mind.* (R. 75, bottom—76, top.)

"None of the pickets in front of the store *ever were employed* in the store and I had never seen them before. They were strangers to me. None of the defendants *ever sought employment* in the store for themselves or anyone represented by them. (R. 76, top—82, middle.)

"The reason I did not notify defendants by formal resignation between the time I joined and the time they started to picket was because of their agent's statement to me that they would picket if I did not belong." (R. 83, middle.)

Respondent Day (agent of respondent Local Union), whose dealings with the employees is above related by them, *did not testify,* and their testimony is uncontradicted. Respondent Housewright (agent of respondent International Association) testified, and did not deny any of the above facts testified by the employees, but corroborated them by the following testimony:

Vernon Housewright (R. 103-113):

"I was an officer of the International and Mr. Day was an officer of the Local, and during the time in question he was an organizer of the Local and *all that both of us did* in connection with picketing with Roth's store *was done on behalf of our respective unions.* That was our jobs. I do not know how long Mr. Day had been in Hammond previous to my arrival in May, 1939. *I do not undertake to state what conversation Mr. Day may of had with these employees before my arrival.* Mr. Day was with me in the store on May 17, 1939. I did the talking on this morning. Mr. Day may have said something. I don't remember what he said. *The clerks told me they would not strike.* The picket line was established about ten or fifteen minutes later. I had the picket and the sign prepared before I went into the store that morning. (R. 111, bottom—112, bottom.

"I gave Mr. Roth a final opportunity to *sign* and when he refused, I established a picket line. *If Mr. Roth had signed, I would not have established the line.* It was my intention to run the picket line *until* Mr. Roth decided to *sign* the contract *and if he would sign the contract I gladly would have withdrawn the picket.*" (R. 113, top.)

Stipulation:

The parties stipulated the contents of the contract which is above referred to in respondent Housewright's testimony, as follows:

"It is stipulated that the contract which the union presented to Aaron Roth * * * contained the provision that while Mr. Roth could employ clerks who were not members of the defendant union, they *must*, within thirty days after the date of such employment, agree to *become* members of the union, *and upon failure so to do they would be discharged.* The contract further provided for wages, hours of employment and certain working conditions in conformity with the rules and regulations, constitution and by-laws of the defendant union. The 30-day provision would apply to *any clerks in Mr. Roth's employ, who were not then members in good standing* of the defendant union." (R. 96.)

Finding by Trial Court (R. 47-50):

Upon the above uncontradicted testimony of the employees, and admissions of respondents, the trial court made the following findings of fact:

"2. There was no strike in this store. Plaintiff was at peace with all his employees. None of them wanted to belong to this union. The picket was not an employee of the store but was a paid agent of the union. *The object* of the picketing was to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the *employees* would be *compelled* to join the union, against their will, or be discharged. The Union is Local No. 1460 of Retail Clerks Union. (R. 48, middle.)

"3. Said union *formerly induced* said three employees to join the union by *coercion*, to-wit: Threatening them that if they did not join, the store would be picketed and that they would lose their jobs, and solely because of said threat the employees joined the union a few weeks prior to the picketing; but said employees resigned therefrom at the first opportunity, to-wit: On May 17, 1939, just *before* the starting of the picketing, the defendants requested said employees to go on strike and threatened them with a fine if they did not, and said employees *then*

refused to go on strike and afterwards on the afternoon of the same day signed a written resignation from the union which was delivered to the union the next day, notwithstanding which the union continued to picket by its said agents as aforesaid. (R. 48, bottom.)

"4. All of said three employees, Dorothy Carlson, W. A. Barnes, and Meyer Kaplan, resigned from said union *solely of their own free will* and accord, and solely because of their own personal desire so to do. *They were not in any way, or to any extent, coerced, interfered with, intermeddled with, aided or encouraged by plaintiff*, or by anyone on his behalf, with regard to said resignation, or with regard to any of their other relations with any of the defendants. The resignation handed to them by plaintiff with the request to read it was *not a motivating factor* in their signing said resignation. *Before* receiving said form from plaintiff said three employees had previously, on the morning of that day, refused the command of defendants to strike, and *they had intended* and did intend by this refusal to *repudiate* their membership in said union, and to repudiate all rights of the defendants to represent them, which intent had existed prior to the time the picketing started and *prior* to their being handed said form by plaintiff. Likewise, at the time of said repudiation and prior to the picketing, defendants had informed said employees that they were no longer members and that it would cost them a fifty-dollar fine to get back in. Plaintiff by refusing to sign said contract did not intend to be unfair to defendants or to organized labor, and *had not done anything detrimental* to the interests of defendants or organized labor. * * *" (R. 49, top.)

The Indiana Supreme Court's opinion does not overrule, modify or refute the above findings, but simply ignores them and ignores the uncontradicted evidence and admissions supporting them.

Issues:

Besides basing its opinion on fictitious facts, the Indiana Supreme Court based its opinion on a fictitious *issue*. Respondents never *pleaded* any charge of coercion or causing resignations, against petitioner, in their answer. (R. 7.)

Basing its judgment on a fictitious issue deprives petitioner of equal protection and due process of Indiana law. The law is settled in Indiana that all such affirmative defenses must be specially pleaded and that no Indiana court can render a judgment on an issue not pleaded.

Boardman v. *Griffin*, 52 Ind. 101, 106.

Secs. 2-101, 2-1015, 2-1024, Burns' Ind. Statutes 1933.

Same Essential Facts in First Appeal:

The facts found by the trial court in the first trial on temporary injunction (R. 10-12) are substantially the same as found in the new (present) trial, except that in the latter the trial court added to its findings an express negation of coercion by petitioner. (R. 47-50.)

And it appears on the *face of the opinion* in the first appeal, that the *essential facts*, on which the Indiana Supreme Court pronounced the law were the same as the present evidence. The first opinion states the facts as follows:

> "In the facts found it appears that at all the times under inquiry the plaintiff owned and operated a small retail grocery, fruit, and vegetable store in the City of Hammond and that he had three employees; that the defendant Local Union No. 1460 of Retail Clerks Union *coerced* said employees into *joining* its organization, by threatening them that if they did not do so the store would be picketed and that they would

lose their jobs; that thereafter the *union requested said employees to go on strike* and threatened them with fines if they refused; that the employees *refused to strike* and resigned from the union; * * * that there was no strike in the store; that plaintiff was at peace with his employees; that none of them belonged or wanted to belong to said union; and that 'the object of the picketing (was) to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the employees would be compelled to join the union, against their will, or be discharged.' "

Roth v. *Local Union, etc.*, 216 Ind. 363, 365; 24 N. E. (2d) 280.

The opinion appealed from, and its predecessor to which it refers, attempt to set up a fictitious distinction between the facts in the first appeal and the present evidence. These alleged distinctions are:

(1) That the facts in the first appeal came up in the form of special findings instead of evidence. (This makes no difference because Indiana law permits an appellant to take up facts in the form of special findings instead of evidence.

Graham v. *State, ex rel.*, 66 Ind. 386, 394 (middle), 395 (bottom).

Fort Wayne etc. Works v. *City of Fort Wayne*, 214 Ind. 454, 462 (top).

Secs. 2-2102 and 2-2502, Burns' Ind. Sts. 1933.

(2) That the findings in the first appeal made it appear to the Supreme Court that the employees were not union members at the time the picketing began and at the time the Union demanded that petitioner sign. (No such thing was shown in those findings, but on the contrary they plainly stated to the Supreme Court that "just *before* starting the picketing, the defend-

ants requested said employees to go on strike and threatened them with fine if they did not, and said employees *then* refused to go on strike and *afterwards* on the afternoon of the same day signed a *written resignation* from the union which was delivered to the union the *next day*, notwithstanding which the union *continued* to picket by its said agents as aforesaid." (R. 11, bottom.) Which is precisely the same state of facts shown by the findings on the second appeal. (R. 27, bottom.) And precisely the same state of facts is shown by the present findings on new trial. (R. 48, bottom.)

(3) That the employee, Dorothy Carlson, and her fellow employees were *coerced* to resign from the Union by the mere fact that petitioner handed her a written resignation form,—*after* they orally repudiated the Union, which form they *desired* as a means of escape. (This charge of coercion was false when first made in the second opinion. Its falsity appears on the face of the opinion from the evidence there quoted, 218 Ind. at page 278. Even if such an inference could be tortured out of the evidence quoted in the second opinion, it can't possibly be drawn from the present evidence on the new trial. Yet the present (third) opinion adopts this false charge as its own. (39 N. E. (2d) 775.)

(4) The opinion grasps at fictitious straws to construct an accusation against petition, by:

(a) Complaining of the "mysterious source" of the written resignation letter, which is a trivial and fictitious issue, because the employees as free people had a right to obtain a *desired* written form from any draftsman, and all the evidence

shows that its source was not a moving factor in their resignation and did not operate to influence or coerce them.

(b) After drawing a preposterous inference, the opinion seeks to blame petitioner for not "producing evidence to rebut any erroneous inference we may have drawn from the facts," whereas he did produce the best evidence to rebut the charge of coercion, namely: the employees themselves.

(c) The opinion attempts to charge employee, Dorothy Carlson, with changing her testimony, whereas her previous testimony which was stipulated into the record on new trial is the same. (R. 113, bottom—115.)

(d) The opinion admits that "there may be some doubt from the evidence that she or the other clerks were in fact coerced" and then goes on to state the preposterous conclusion that the employer was nevertheless guilty of coercion as charged in the preceding opinion.

Moreover, this hue and cry about this written resignation is a false and obsolete issue, because the resignation was signed on May 17, 1939, the day *before petitioner filed his suit* on May 18, 1939. (.....) So the status never changed after suit was filed. Respondents' answer does not assert the right to picket in order to *punish* petitioner for any *past offense* and does not even charge that it was an offense. Their answer filed on May 22, 1939, refers to the employees as non-members of the union and says that "plaintiff's employees have no labor organization of their own and are *wholly unorganized.*" (R. 8, top.) The only pleaded ground of petitioner's "unfairness" is that he

now refuses to *sign* the contract. (R. 8, top.) And respondents so testified and stipulated. See Housewright's testimony and stipulation, above, at page 18 of this petition.

The same answer was before the court on the last appeal as on the first, never having been amended.

And the same essential facts were before the court on the last appeal, as above shown.

Indiana Law Protects Other Citizens in Petitioner's Situation:

In its first opinion the Indiana Supreme Court construed the Indiana statute to mean as follows:

The statute here under consideration declares that it is the public policy of this state that the *individual unorganized worker shall be free to decline to associate* with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean that *no labor union may demand that an employer require his employee to join such union*, because no employer has the right to require an employee to join or refrain from joining a labor union. *Any person* or group which undertakes to coerce an employer to do that which is contrary to the express public policy of this state thereby undertakes to compel the performance of an *unlawful act*. The lawful weapon of peaceful picketing may not be utilized to accomplish *such an unlawful purpose*. It is quite immaterial that the things done to bring about the unlawful purpose were not *per se* unlawful. *This is our interpretation of our statute.*

Roth v. *Local Union, etc.*, 216 Ind. 363, 370, 24 N. E. (2d) 280.

The above construction became a part of the statute,

and every citizen of Indiana is entitled to its protection, upon showing that his situation is substantially similar to the state of facts set forth in that opinion. This, petitioner has done in the present record. He has shown identical issues. He has shown facts identical on all essentials and even stronger on some details.

While the statute thus construed would protect any other citizen of Indiana in petitioner's situation, he has been denied protection by means of painting him in the fictitious role of a law violator coercing his employees, thereby placing him outside the pale of the law.

While claiming to be solicitous to protect the employees from imaginary coercion of petitioner, the last opinion throws them to the vengeance of their real oppressors, and compels them to beg to re-join the Union at a fine of $50.00 per head (or any other terms the Union cares to fix, perhaps total exclusion).

The Indiana law says it is unlawful for the Union to force them to rejoin,—yet the court opens the door for the Union to go on picketing to accomplish this wrong. More, it compels petitioner to join in committing the wrong, else his property will be destroyed.

The opinion tells the employer that he sinned before by handing a "mysterious" letter. Now the court compels him to break the law again to protect his property. The court denies protection but plainly indicates to him that he can purchase private relief from the Union by breaking the law.

Even if he had offended the law by the letter episode (which he did not), the Indiana court cannot arbitrarily close its doors on him, thereby inflicting a property loss of unlimited amount regardless of the triviality of the supposed offense.

The first opinion, above quoted, has never been reversed, modified in later decisions of that court. So it stands today as the construction of that statute and as a part of the statute. We briefly review all subsequent picketing decisions of the Indiana Supreme Court to show this point:

The second and third opinions in this case (218 Ind. 275, 31 N. E. (2d) 986, and 39 N. E. (2d) 775), make no attempt to modify the above quoted construction placed on the statute in the first opinion (216 Ind. 363). On the contrary, the second opinion expressly recognizes that construction (218 Ind. 275, at bottom of page 276). The second opinion merely orders a new trial on pure questions of evidence. The third opinion does not even mention the statute but goes off on alleged questions of evidence. The second and third opinions let the statutory construction stand for the benefit of other citizens but attempt to exclude petitioner from the class.

Davis v. *Yates,* 218 Ind. 364, 32 N. E. (2d) 86, decided eight days after the second opinion, does not even mention the statute or petitioner's case, and makes no attempt to change the statutory construction. It's facts are entirely different,—former employees seeking re-employment and protection against a sub-standard pay scale of the employer. No such question is in our case, because the trial court found that respondents sought no employment and made no complaint about this employer's standards, which were superior to the Union's (R. 49, middle), and the uncontradicted evidence so showed. (R. 75, middle—82, middle.)

Davis v. *Yates, supra,* 218 Ind. 364, properly holds that its facts fall within the scope of United States Supreme Court decisions on free speech. *But, very significantly,*

the Indiana Supreme Court did not attempt to use the free speech doctrine to justify its second opinion (218 Ind. 275), decided eight days prior to *Davis* v. *Yates*, and at the same term; nor did the court attempt to use the free speech doctrine to justify its third opinion (39 N. E. (2d) 275), decided a year after *Davis* v. *Yates*. The court apparently recognized that free speech could not be used as a cloak to cover unlawful and coercive conduct by such as was condemned in the first opinion (216 Ind. 363), so the court let the law of the first opinion stand and put petitioner beyond its pale by fictitious accusations. The court was doubtless aware of this Court's ruling that:

> "We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing *a coercive effect* whereby it would operate destructively as force and intimidation."
>
> *Milkwagon Drivers Union, etc.* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836.

Indiana undoubtedly had the power to make the law which is established in the first opinion in this case (216 Ind. 363), in view of the following recent decisions of this court:

> *Carpenter's etc. Union* v. *Ritter's Cafe* (March 30, 1942), 62 S. Ct. 807, 809, 316 U. S. ...., 86 L. Ed. .....
>
> *Hotel & Restaurant Employees etc.* v. *Wisconsin Employment Relations Board* (March 2, 1942,) 62 S. Ct. 706, 708, 315 U. S. ...., 86 L. Ed. ...

But the primary question here presented is not the state's power to establish this law, but the denial of equal protection of the law while the law is apparently valid and is operating for the benefit of other citizens.

Additional Discrimination:

Besides the rule of law laid down in the first appeal of this case, already discussed (216 Ind. 363), the Indiana Supreme Court has established another rule of law, to-wit:

> "It is established by the authorities beyond controversy that picketing which involves *false statements or misrepresentation of facts* concerning the controversy *is unlawful and will be enjoined.*"
>
> *Weist* v. *Dirks,* 215 Ind. 568, 572, 20 N. E. (2d) 969.

The following findings by the trial court were sufficient in themselves to entitle petitioner to relief under the last quoted rule of law:

> "* * * after plaintiff had refused to sign the contract hereinafter referred to, defendants commenced to picket plaintiff's store by causing one of their agents to walk continually to and fro on the sidewalk in front of said store, wearing a sign reading in substance as follows: 'This store is *unfair* to Retail Clerk's Union Local No. 1460, affiliated with American Federation of Labor.' Said signs and picketing conveyed to the public and to plaintiff's customers the idea that plaintiff refused employment to or discriminated against members of defendant union, which idea implied representations which were false. (R. 47, bottom.)
>
> "* * * Plaintiff by refusing to sign said contract did not intend to be unfair to defendants or to organized labor, and had not done anything detrimental to the interests of organized labor or to defendants. At the time of said picketing, and continually down to the present time, the wages, hours and working conditions in plaintiff's store were *equal to or better than those promulgated by defendants,* and to the standard prevailing in the City of Hammond, Indiana, in that line of work. *None of defendants had at any time made any complaint or request upon plaintiff*

with respect thereto, except that set forth in finding No. 2 (to sign the contract). Neither did defendants at the time of the picketing or at any time since *desire or request employment by plaintiff for themselves or anyone represented by them.* None of the defendants or anyone represented by them was ever employed in said store." (R. 49, middle.)

The above findings are supported by all the evidence, including the admission of respondent Housewright that the only reason for the picketing branding petitioner "Unfair" to the Union was his refusal to sign an agreement to do an act which would be unlawful under Indiana law (namely force his employees to re-join the Union).

See: Housewright's testimony, R. 113, top; Barnes' testimony, R. 74, 75, 82; Stipulation, R. 96.

The above quoted rule of law laid down in *Weist* v. *Dirks,* 215 Ind. 568, 572, is still in full force in Indiana never having been overruled, modified, or even mentioned in any subsequent decision.

Yet the Indiana Supreme Court failed to give petitioner the protection of this rule of law which protects other citizens. The Court ignored this law, apparently for the same reason that it expressly refused him protection of the statute, namely, that he was a sinner and hence an "untouchable" to the court.

Wherefore, petitioner respectfully prays this Honorable Court to bring up this cause by its writ of certiorari to the Supreme Court of Indiana, and for all further just and proper relief in the premises.

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